IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3921 OF 2006

Albright & Wilson Chemicals (P) Ltd.
and Ors. .. Petitioners

V/s

Union of India & Ors. .. Respondents

Mr.D.B Shroff i/b P.J. Ranga for the Petitioners.

Mr.A.S. Rao with Mr.Y.R. Mishra and Mr.Prajapati for the Respondents.

CORAM : H.L. GOKHALE & J.P. DEVADHAR, JJ.

DATE : 18TH AUGUST 2006

P.C. :

1. Heard Mr.Shroff for the Petitioners and Mr.Rao for the Respondents.

2. Rule. Rule is made returnable forthwith.

3. The Petitioners herein are challenging the pre-deposit order passed by the Commissioner (Appeals), Central Excise dated 16th May 2006 whereby he has directed the Petitioners to deposit 50% of the duty which the Excise Department has found as outstanding.

4. What has happened in the present case that a

show cause notice-cum-demand notice was served on the Petitioners by the Additional Commissioner, Central Excise, Raigad dated 29th April 2005. The notice stated that the Petitioners had declared for payment of duty the cost of the concerned material without including the notional profit margin. It was therefore stated that a differential duty of Rs.29,06,986 was recoverable under section 11A(1) of the Central Excise Act, 1944 along with the interest under section 11AA and/or section 11AB thereof. That notice led to the adjudication and thereafter the appeal to the Commissioner (Appeals) who has passed this pre-deposit order.

5. Mr.Shroff, learned counsel appearing for the Petitioners, submits that as required by the proviso to section 11A of the Central Excise Act, a show cause notice thereunder must allege that there has been a short levy or short payment by reason of fraud, collusion or any wilful mis-statement or suppression of facts. He points out that there is no such specific allegation in this notice and, therefore, relies upon the judgment of the Apex Court in the case of **Collector, Central Excise v. HMM Limited - 1995 (76) E.L.T. 497** rendered by the Apex Court, which has been followed subsequently in different judgments rendered from time to time until the recent one in **Cadila Laboratories Pvt. Ltd. v. Commissioner of Central Excise, Vadodara -**

2003 (152) E.L.T. 262. He further points out from the exhibits to the petition that according to the Petitioners, in fact there is no such short payment and that the notional profit margin has been included while filing the returns.

6. Mr.Rao, learned counsel appearing for the Respondents, submits that the order of the Commissioner (Appeals) is a perfectly justified one. He submits that the Commissioner (Appeals) has considered all relevant factors and thereafter directed pre-deposit of 50% of the outstanding duty.

7. In our view, this is a case where the Petitioners, after relying upon the judgments of the Apex Court, submit that there is no specific assertion of wilful mis-statement on the part of the Petitioners. That apart, it is necessary for the Respondents to establish that there has been incorrect declaration on the part of the Petitioners leading to any such deficiency in payment of outstanding duty. In the facts of the present case, therefore, in our view, the order requiring pre-deposit will have to be interfered with, which we accordingly do, and revive the appeal to the file of the Commissioner (Appeals), who will decide the same on merits without insisting on any pre-deposit. Needless to state that the Commissioner (Appeals) will

decide the appeal on its own merits independent of the observations that we have made in this order.

8. Rule is made absolute as above. No order as to costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)